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Shinei Geotechnique (M) Sdn Bhd & Ors v Orix Credit (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-2337–10 OF 2013
DAVID WONG, TENGKU MAIMUN AND UMI KALTHUM JJCA
19 JUNE 2014

Banking — Financing facilities — Guarantee — Liability of guarantor — Liability to pay arising upon written demand — Limitation period commencing from date of demand — Principal debtor clause — Whether obviates need for notice of demand to guarantors

Contract — Guarantee — Liability of guarantor — Liability to pay arising upon written demand — Limitation period commencing from date of demand — Principal debtor clause — Whether obviates need for notice of demand to guarantors

Contract — Loan — Interest payments — Late payment charges — Whether pre-agreed interest a penalty interest — Whether exorbitant — Whether plaintiff could challenge liability to pay interest

Contract — Mistake — Recovery of money paid by mistake — Payment of interest under loan agreement — Payment made with clear knowledge and intention to settle part of outstanding interest due — Whether recipient liable to return money — Whether payment by mistake established

Limitation — Accrual of cause of action — Acknowledgment of debt by defendant — Payment of interest under defaulted loan — Whether payment must be towards principal or interest for purposes of extending limitation period — Limitation Act 1953 s 26(2)

The first appellant/first defendant had entered into two hire purchase agreements with the plaintiff, dated 31 March 1998 ('the first agreement') and 29 August 1998 ('the second agreement'). The second and the third appellants/defendants were the guarantors. The first defendant defaulted in making the monthly repayments and the plaintiff imposed late payment interest as agreed. Interest payment under the first agreement was paid by the first defendant on 17 December 2007; 15 March 2008 and 15 April 2008. Interest payment under the second agreement was paid on 15 April 2008 and

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15 May 2008. By a letter dated 8 March 2012, the plaintiff's solicitors demanded payment from the defendants the overdue interest owing as at 6 March 2012. The defendants failed to pay, and the plaintiff commenced the present suit against them. The defendants contended that the plaintiff's claim was barred by limitation and that the late payment interest was a penalty and was unenforceable. The defendants contended that the first late payment interest became due on 9 October 1998 and the last late payment interest became due on 29 March 2005 and thus the period of six years for the recovery of the late payment interest had already expired when the plaintiff filed this suit on 27 September 2012. The defendants further contended that even if the cause of action had been extended on the date of payment made by the first defendant, the plaintiff's claim was unsustainable under the proviso to s 26(2) of the Limitation Act 1953 ('Act'). The defendants counterclaimed for the refund of the interest that were partly paid to the plaintiff on the ground that the payments were made under a mistake of fact and law. The High Court allowed summary judgment of the plaintiff's claim and dismissed the counterclaim. Hence this appeal by the defendants.

Held, dismissing the appeal with costs:

(1) Section 26(2) of the Act provides for the fresh accrual of action on acknowledgment or on any payment of any debt or other liquidated pecuniary claim. Since no distinction is made as to whether the acknowledgment is for the principal sum or interest or whether the payment is for the principal sum or interest, the word 'makes any payment' in the said subsection must be given an interpretation that any payment made can be either towards principal or towards interest for the purposes of extending the limitation period (see para 22).

(2) Further, applying the principle of interpretation ie *noscitur a sociis* and *ejusdem generis* rule, the meaning of the word 'interest' in the proviso must be construed as being in relation to the word 'rent' and not interest in relation to any debt or claim (see para 23).

(3) There was no merit in the ground raised by the defendants that the plaintiff's claim had the element of a penalty and that it was unenforceable. The rate of interest was agreed upon, hence the defendants could not be heard to complain that it was exorbitant and the interest was calculated from the date of default. Hence, the counterclaim for the refund of the late payment interest could not be sustained (see paras 23–24).

(4) The part payment for the interest had been made by the first defendant pursuant to the agreements. There could not be a mistake as such when payment was made by the first defendant with the clear knowledge and intention to settle part of the outstanding interest due to the plaintiff under the agreements (see para 25).

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(5) Insofar as the guarantors were concerned, as clearly set out in the guarantee, the liability to pay arose upon a written demand. Time therefore started to run from the date of the demand and not from the date of the breach by the borrower. Taking the date of the notice of demand, the plaintiff was well within time to file the suit against the guarantors; *Bank Bumiputra Malaysia Bhd v Fu Lee Development SdnBhd&Ors* [1991] 2 MLJ 202 referred (see para 26).

(6) The principal debtor clause did not obviate the need for a notice of demand to the guarantors. The clause, merely reiterated the obligation or the liability on the part of the guarantors to make good the guarantee and to repay the installments or the amounts due to the borrower, as would the principal debtors (see para 27).

[Bahasa Malaysia summary

Perayu pertama/defendan pertama telah memasuki dua perjanjian sewa beli dengan plaintif, bertarikh 31 Mac 1998 ('perjanjian pertama') dan 29 Ogos 1998 ('perjanjian kedua'). Perayu-perayu kedua dan ketiga merupakan penjamin-penjamin. Defendan pertama telah gagal membuat bayaran semula bulanan dan plaintif telah mengenakan faedah bayaran lewat sebagaimana dipersetujui. Bayaran faedah di bawah perjanjian pertama telah dibayar oleh defendan pertama pada 17 Disember 2007; 15 Mac 2008 dan 15 April 2008. Bayaran faedah di bawah perjanjian kedua telah dibayar pada 15 April dan 15 Mei 2008. Melalui surat bertarikh 8 Mac 2012, peguamcara plaintif telah menuntut bayaran daripada defendan-defendan faedah tertunggak yang terhutang sehingga 6 Mac 2012. Defendan-defendan telah gagal untuk membayar, dan plaintif telah memulakan guaman ini terhadap mereka. Defendan-defendan berhujah bahawa tuntutan plaintif telah dihalang oleh had masa dan bahawa faedah bayaran lewat adalah suatu penalti dan tidak boleh diramalkan. Defendan-defendan berhujah bahawa faedah bayaran lewat pertama kena dibayar pada 9 Oktober 1998 dan faedah bayaran lewat terkahir kena dibayar pada 29 Mac 2005 dan oleh itu tempoh enam tahun untuk mendapat semula faedah bayaran kewat telahpun luput apabila plaintif memfailkan guaman ini pada 27 September 2012. Selanjutnya defendan-defendan berhujah bahawa jikapun kausa tindakan telah melanjutkan tarikh bayaran yang dibuat oleh defendan pertama, tuntutan plaintif tidak boleh dikekalkan di bawah proviso s 26(2) Akta Had Masa 1953 ('Akta'). Defendan-defendan menuntut balas untuk bayaran semula faedah itu yang sebahagian telah dibayar kepada plaintif atas alasan bahawa bayaran-bayaran itu telah dibuat di bawah kesilapan fakta dan undang-undang. Mahkamah Tinggi membenarkan penghakiman terus untuk tuntutan plaintif dan menolak tuntutan balas. Justeru rayuan ini oleh defendan-defendan.

Diputuskan, menolak rayuan dengan kos:

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(1) Seksyen 26(2) Akta memperuntukkan untuk tindakan baru yang terakru atas pengakuan atau atas apa-apa pembayaran apa-apa hutang atau tuntutan jumlah tertentu wang. Oleh kerana tiada perbezaan dibuat berhubung sama ada pengakuan itu adalah untuk modal pokok atau faedah atau sama ada bayaran itu adalah untuk modal pokok atau faedah, perkataan 'makes any payment' dalam subseksyen tersebut hendaklah diberikan tafsiran bahawa apa-apa bayaran yang dibuat kepada modal atau faedah bagi tujuan melanjutkan tempoh had masa (lihat perenggan 22).

(2) Selanjutnya, dengan mengguna pakai prinsip pentafsiran iaitu rukun *noscitur a sociis* and *ejusdem generis*, maksud perkataan 'interest' dalam proviso hendaklah ditafsir sebagai suatu yang berkaitan dengan perkataan 'rent' dan bukan faedah berkaitan apa-apa hutang atau tuntutan (lihat perenggan 23).

(3) Tiada merit dalam alasan yang ditimbulkan oleh defendan-defendan bahawa tuntutan plaintif mempunyai elemen penalti dan bahawa ia tidak boleh dikuat kuasakan. Kadar faedah telah dipersetujui, justeru defendan-defendan tidak boleh mengadu bahawa ia adalah terlalu tinggi dan faedah itu dikira dari tarikh kegagalan. Justeru, tuntutan balas untuk bayaran semula untuk faedah bayaran lewat tidak boleh dikekalkan (lihat perenggan 23–24).

(4) Sebahagian daripada bayaran untuk faedah telahpun dibuat oleh defendan pertama menurut perjanjian-perjanjian itu. Tidak mungkin berlaku kesilapan apabila bayaran dibuat oleh defendan pertama dengan pengetahuan dan niat untuk menyelesaikan sebahagian daripada baki faedah yang kena dibayar kepada plaintif di bawah perjanjian-perjanjian itu (lihat perenggan 25).

(5) Sejauhman penjamin-penjamin adalah berkaitan, sebagaimana ditetapkan dengan jelas dalam jaminan, liabiliti untuk membayar dibangkitkan dalam tuntutan bertulis. Oleh itu masa bermula dari tarikh tuntutan itu dan bukan dari tarikh pelanggaran oleh peminjam. Dengan mengambil kira tarikh notis tuntutan itu, plaintif masih dalam tempoh masa untuk memfailkan guaman terhadap penjamin-penjamin (lihat perenggan 26); *Bank Bumiputra Malaysia Bhd v Fu Lee Development Sdn Bhd & Ors* [1991] 2 MLJ 202 dirujuk.

(6) Fasal penghutang utama tidak menyingkirkan keperluan untuk notis tuntutan kepada penjamin-penjamin. Fasal itu, hanya mengulangi obligasi atau liabiliti di pihak penjamin-penjamin untuk menggunakan jaminan dengan baik dan membayar balik ansuran atau jumlah yang kena dibayar kepada pemberi pinjaman, sebagaimana akan dibuat oleh penghutang-penghutang utama (lihat perenggan 27).]

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Notes

For a case on acknowledgement of debt by defendant, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) para 2138.

For a case on recovery of money paid by mistake, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 5655.

For cases on interest payments, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5517–5518.

For cases on liability of guarantor, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5059–5071.

Cases referred to

Bank Bumiputra Malaysia Bhd v Fu Lee Development Sdn Bhd & Ors [1991] 2 MLJ 202, HC (refd)

Kok Swee Chin v General Factoring & Credit Sdn Bhd [2004] 6 MLJ 276; [2004] 6 CLJ 101, HC (refd)

MBF Finance Bhd v Hasmat Properties Sdn Bhd & Ors [1990] 1 MLJ 180, HC (refd)

Malayan Banking Bhd v Ching Suit Fee [2012] 2 MLJ 289; [2012] 3 CLJ 606, FC (refd)

NV Alliance Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2012] 1 MLJ 441; [2012] 2 CLJ 211, CA (refd)

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad [1989] 3 MLJ 155, SC (refd)

Provincial Insurance Co Ltd v Yeo Chee Swee [1984] 2 MLJ 60; [1984] 1 CLJ (Rep) 314, FC (refd)

Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd [2000] 1 MLJ 513; [2000] 1 CLJ 346, CA (refd)

Taylor, Ex parte Century 21 Real Estate Corporation, Re (1995) 130 ALR 723, FC (refd)

Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In Receivership) [1996] 2 MLJ 461, FC (distd)

Legislation referred to

Contracts Act 1950 s 73
Limitation Act 1953 s 26(2)
Rules of Court 2012 O 14A

Appeal from: Civil Suit No 22NCC 1569–10 of 2012 (High Court, Kuala Lumpur)

Amarjeet Singh (S Ashok with him) (Leela A Sanghrajka & Assoc) for the appellants.
K L Wong (K L Wong) for the respondent.

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Tengku Maimun JCA (delivering judgment of the court):

[1] The appellants were the defendants in the court below. The first defendant had entered into two hire purchase agreements dated 31 March 1998 ('the first agreement') and 29 August 1998 ('the second agreement') with the plaintiff. The second and the third defendants were the guarantors. For ease of reference, in this judgment, parties will be referred to as they were in the High Court.

[2] Under the first agreement, the monthly instalment was to be settled over a period of three and a half (3 1/2) years while for the second agreement, it was supposed to be settled over a period of three years. Both the agreements provide that interest at the rate of 0.065% calculated on a daily basis is to be paid, on monies payable to the plaintiff, which may from time to time be overdue.

[3] The first defendant had defaulted in making the monthly repayments as agreed. The first agreement was only settled in December 2005 and the second agreement, in March 2005. Due to the delay, the plaintiff imposed the late payment interest as agreed, which the first defendant had also failed to settle in full. Payment for interest for the first agreement in the sum of RM83,837.07 was made by the first defendant on 17 Decmber 2007; 15 March 2008 and 15 April 2008. For the second agreement, the payment of interest totalling RM129,588.66 was made on 15 April 2008 and 15 May 2008.

[4] By a letter dated 8 March 2012, the plaintiff's solicitors demanded payment from the defendants the overdue interest owing as at 6 March 2012 in the sum of RM1,189,962.09. The defendants failed to pay, hence the suit in the High Court.

[5] In their defence, the defendants pleaded that the plaintiff's claim was barred by limitation and that the late payment interest was a penalty and was unenforceable. The defendants counterclaimed for the refund of the interest that were partly paid to the plaintiff. The basis of the counterclaim was that the payments were made under a mistake of fact and law.

[6] The matter was dealt with by the learned High Court judge under O 14A of the Rules of Court 2012 where the following five issues were framed for determination:

(a) whether the plaintiff's claim against the first defendant for the late payment interest totalling RM1,189,962.09 under the Hire Purchase Agreement No 101-1998-00059-4 dated 31 March 1998 (Agreement

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No 1) and Hire Purchase Agreement No 101-1998-00178-6 dated 29 August 1998 (Agreement No 2) is barred by limitation under the Limitation Act 1953;

(b) whether the plaintiff's claim against the second defendant and the third defendant as guarantors pursuant to the letter of guarantee and indemnity dated 31 March 1998 and 29 August 1998 is barred by limitation under the Limitation Act 1953;

(c) whether the plaintiff's claim for late payment interest at the rate of 0.065% as provided in cl 5(c) of the said agreements is a penalty or compound interest and not enforceable in law;

(d) whether the payment by the first defendant to the plaintiff for the sum of RM83,837.07 and RM129,588.66 was made under a mistake of fact or law; and

(e) whether the first defendant is entitled to claim for the return of the monies paid to the plaintiff totalling the sum of RM83,837.07 and RM129,588.66.

DECISION OF THE HIGH COURT

[7] The learned High Court judge was not with the defendants on all the issues. On limitation, the learned judge said:

> 17 Dalam kes ini bayaran terakhir sewaan untuk perjanjian pertama ialah pada 12.12.2005 dan perjanjian kedua ialah 29 March 2005 yang telah terlewat daripada tarikh yang ditetapkan. Akibatnya, berdasarkan fasal 5(c), kedua-dua perjanjian, defendan pertama bertanggungan untuk membayar faedah lewat. Fasal 5(c) memperuntukkan seperti berikut:
>
> (5) The Hirer further agrees:
>
> (a) xxx
>
> (b) xxx
>
> (c) Without prejudice to any of the owner'srights hereunder to pay simple interest at 0.065% calculated on a daily basis on any monies payable hereunder which may from time to time be overdue until such monies are paid to the Owner.
>
> 18 Defendan pertama telah membuat sebahagian bayaran faedah lewat dan bayaran yang terakhir bagi kedua-dua Perjanjian Pertama dan Kedua ialah pada 15.4.2008 dan 15.5.2008 masing-masing (eksibit PLH-4 dan PLH-5 dalam kandungan 10). Kini tuntutan adalah terhadap baki faedah tersebut. Peguam defendan menghujahkan bahawa tuntutan faedah tersebut adalah di luar had masa tindakan dan kausa tindakan tidak dihidupkan atau dilanjutkan oleh pembayaran faedah lewat oleh defendan pertama pada 15.5.2008 dan 15.5.2008 yang masing-masing untuk Perjanjian Pertama dan Kedua di bawah subseksyen 26(2) Akta Had Masa 1953 kerana tertakluk kepada proviso kepada subseksyen tersebut.

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(19) Dengan hormatnya saya tidak bersetuju dengan hujahan peguam defendan yang bijaksana kerana dalam kes ini jumlah faedah lewat yang tidak dibayar oleh defendan-defendan telah terakru dan telah menjadi hutang (debt due) bukanlah faedah ke atas prinsipal tetapi merupakan faedah yang telah dipersetujui sekiranya berlaku kelewatan bayaran bagi setiap bayaran sewaan. Oleh itu berdasarkan subseksyen 26(2) apabila terdapatnya pembayaran hutang, had masa tuntutan dilanjutkan bermula pada tarikh pembayaran sebahagian hutang tersebut.

[8] On whether the plaintiff's claim is for a penalty and therefore unenforceable, the learned trial judge found:

(20) Hujahan defendan ialah tuntutan plaintif adalah untuk faedah berganda kerana menuntut faedah terhadap bayaran ansuran yang lewat dibayar. Defendan juga berhujah bahawa plaintif telah mengenakan dua kali faedah iaitu faedah atas kadar tetap (flat rate) dan faedah ke atas bayaran lewat, oleh itu kes *Realvest Properties Sdn Berhad v Co-operative Central Bank Ltd (in receivership)* [1996] 2 MLJ 461 (FC) terpakai di mana kedua-dua faedah tersebut disatukan menjadi penaiti oleh itu tidak boleh dikuatkuasakan di bawah Akta Kontrak 1950.

(21) Walau bagaimanapun, saya tidak sependapat dengan hujahan peguam defendan yang bijaksana yang menyamakan fakta kes ini dengan kes yang mereka rujuk seperti di atas. Kes *Realvest* supra yang dirujuk oleh peguam melibatkan satu terma nyata berkenaan 'additional interest' seperti yang terkandung dalam fasal 3.2 Annexure Form 16. Saya perturunkan petikan fasal tersebut:

> In the event that any amount due under this agreement (whether of principal or interest due under this Article) is not received by the Bank on the due date, the chargor shall pay to the bank interest at the rate of One and One Third (1-1/3) times the normal ruling rate of interest on the sum in arrears, calculated retrospectively from the due date at such default until the date of the payment of the amount thereof.

(22) Adalah diputuskan oleh Mahkamah Persekutuan dalam kes *Realvest* supra, fasal 3.2 membawa elemen pembayaran faedah berganda. Saya perturunkan dapatan Mahkamah Persekutuan tersebut:

> Reverting to the instant appeal and having regard to what had been stated in the privy council, we have, in hand, the element of 'additional money payment' involved also, in that on default, a default interest of 20% p.a chargeable separately and additionally on arrears comprising principal and interest, became payable. It will be clear from the evidence e.g at page 153 of the Appeal Record that the default interest of 20% p.a was paid, side by side with the interest calculated by prescribed rate of interest of 14.5% p.a. on the same money lent or owed for the same span of time.

(23) Berbeza dengan kes di hadapan saya faedah yang dikenakan adalah faedah lewat bayar dan bukanlah faedah ke atas prinsipal mahupun faedah ke atas faedah seperti di dalam kes *Realvest* supra. Perlu untuk saya tegaskan bahawa di dalam kes di hadapan saya tiada elemen 'additional interest' ataupun faedah berganda. Faedah lewat bayar dikenakan atas kelewatan defendan membuat bayaran pada tarikh akhir setiap bulan sepertimana yang telah dipersetujui oleh kedua-dua pihak. Bayaran

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faedah ini adalah lebih merupakan gantirugi kepada plaintif yang tidak dapat menggunakan bayaran sewaan peralatan pada tarikh yang sepatutnya.

[9] In relation to the defendants' counterclaim, the learned judge made the following finding:

(24) Oleh kerana dapatan saya seperti di perenggan 19 bahawa faedah lewat tersebut adalah sah maka, bayaran oleh defendan pertama adalah sah dan tidak ada kesilapan fakta atau undang-undang kerana bayaran faedah tersebut telah dipersetujui oleh kedua-dua pihak di bawah fasal 5 (c) perjanjian. Oleh itu tuntutan balas adalah sepatutnya ditolak.

(25) Sekiranya saya silap dan hujahan defendan-defendan adalah betul bahawa berdasarkan proviso kepada subseksyen 26(2) pembayaran sebahagian faedah tidak memulakan tindakan baru (fresh accrual of an action), saya berpendapat defendan pertama masih tidak boleh menuntut balik faedah yang telah dibayar kerana pembayaran faedah tersebut telah menjadi sebahagian daripada hutang prinsipal seperti diperuntukkan dalam proviso tersebut.

[10] In respect of the guarantors, the learned judge said:

(26) Saya berpendapat tuntutan terhadap penjamin-penjamin adalah tidak terhalang oleh had masa kerana berdasarkan jaminan, liabiliti adalah berdasarkan 'on demand' atau atas tuntutan ...

(27) Tanggungan penjamin-penjamin berdasarkan perjanjian pertama dan kedua adalah atas tuntutan atau 'on demand' dan juga sebagai penghutang prinsipal seperti yang diperuntukkan dalam fasal 1 dan 3 yang seperti berikut-

1. In consideration of your entering at my/our request into the foregoing Hire Purchase Agreement with SHINEI GEOTECHNIQUE (M) SDN BHD ... (hereinafter called 'the Hirer') I/we the undersigned hereby jointly and severally guarantee on written demand by you the punctual payment by the Hirer of all sums which may become due to you under the said Hire Purchase Agreement ...

3. I/we further jointly and severally agree that my/our liability/ies under this Guarantee and Indemnity shall be as principal debtor and waive all suretyship and other rights inconsistent with this clause ...

(28) Dalam kes ini tuntutan terhadap defendan kedua dan ketiga telah dibuat pada 8 March 2012 (eksibit PLH-6) oleh peguam plaintif. Plaintif kemudiannya telah memfailkan tuntutan pada 27.9.2012 iaitu dalam tempoh enam (6) tahun selepas pembayaran sebahagian hutang tersebut. Oleh itu tuntutan plaintif terhadap defendan kedua dan ketiga adalah tidak dihalang oleh had masa tindakan (*Bradford Old Bank Limited v Sutcliffe* [1918] 2 KB 833 yang kemudiannya diterima pakai oleh Mahkamah Agong dalam kes *Mok Hin Wah & Ors v United Malayan Banking Corporation* [1987] 2 MLJ 610 dan Zakaria Yatim HMT (kemudian HMR) dalam kes *Bank Bumiputra Malaysia Sdn Bhd v Fu Lee Development Sdn Bhd & Others* [1991] 2 MLJ 202).

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[11] Having found against the defendants, judgment was accordingly entered for the plaintiff. The counterclaim was dismissed, hence this appeal by the defendants.

THE APPEAL

[12] The appeal revolved on two main issues, whether the plaintiff's claim was barred by limitation and whether the plaintiff's claim for late payment interest was unenforceable.

[13] Learned counsel for the defendants highlighted the first default by the first defendant under the first agreement which took place on 1 May 1998 when there was a delay of 16 days in making the second instalment payment whereas for the second agreement, the first default took place on 30 September 1998 when there was a delay of 10 days in making the second instalment. The first late payment interest under the first agreement became due on 16 May 1998 while the last late payment interest became due on 12 December 2005. In respect of the second agreement, the first late payment interest became due on 9 October 1998 and the last late payment interest became due on 29 March 2005. Learned counsel thus submitted that the period of 6 years for the recovery of the late payment interest had already expired when the plaintiff filed this suit on 27 September 2012. It was further the submission for the defendants that even if the cause of action had been extended on the date of payment made by the first defendant, the plaintiff's claim is unsustainable under the proviso to s 26(2) of the Limitation Act 1953.

[14] The issue of limitation, argued learned counsel for the defendants, was equally applicable to the guarantors because of the principal debtor clause in the agreements, which had obviated the need for a demand.

[15] It was contended by learned counsel for the defendants that cl 5(c) of the agreements was a penalty and therefore unenforceable. In support of the submission, learned counsel relied on, inter alia, the case of *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd* [1996] 2 MLJ 461.

[16] Consequently, it was the submission of learned counsel for the defendants that the defendants were entitled, under s 73 of the Contracts Act 1950, to the refund of the late payment interest that had been partly paid to the plaintiff.

[17] For the above reasons, it was submitted that the learned judge had committed errors in making the decision as Her Ladyship did.

[18] For the plaintiff, it was submitted that for purposes of extending the

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limitation period under s 26(2) of the Limitation Act 1953, it was necessary to show either an acknowledgment of the claim or any payment made. The said section, submitted learned counsel, made no distinction as to whether payment made was for the principal sum or for interest.

[19] Learned counsel for the plaintiff also submitted that the proviso to sub-s 26(2) referred to payment of the 'rent' and that the word 'interest' must be construed in the context of the word 'rent'; that if there was any limitation on a claim for interest, it would have been expressly provided in s 26(2) and not in the proviso on 'rent or interest'; that the word 'rent' in the proviso to s 26(2) of the Limitation Act was the less general word than 'interest' and that based on two salutary rule of interpretation, ie the noscitur a sociis and the *ejusdem generis* rule, the proviso must be interpreted to mean interest on the rent and not interest on any debt or claim.

[20] In respect of the guarantors, it was the submission of learned counsel for the plaintiff that the guarantee was an on demand guarantee and that the guarantor's failure to pay upon the demand made, formed the plaintiff's cause of action.

OUR DECISION

[21] Section 26(2) of the Limitation Act 1953 provides:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:
>
> Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder of the rent or interest then due, but any payment of interest shall have effect, for the purposes of this subsection only, as if it were a payment in respect of the principal debt.

[22] Section 26(2) of the Limitation Act provides for the fresh accrual of action on acknowledgment or on any payment of any debt or other liquidated pecuniary claim. We accepted the submissions of learned counsel for the plaintiff that since no distinction was made as to whether the acknowledgment was for the principal sum or interest or whether the payment was for the principal sum or interest, the word 'makes any payment' in the said subsection must be given an interpretation that any payment made can be either towards principal or towards interest for the purposes of extending the limitation period.

[23] Further, applying the principle of interpretation ie *noscitur a sociis* (the

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meaning of the more general being restricted to a sense analogous to that of the less general) and *ejusdem generis* rule (the meaning to be given to the general words must be restricted to the same kind or class), we agreed with learned counsel for the plaintiff that the meaning of the word 'interest' in the proviso must be construed as being in relation to the word 'rent' and not interest in relation to any debt or claim (see *NV Alliance Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2012] 6 MLJ 276; [2012] 2 CLJ 211; *Provincial Insurance Co Ltd v Yeo Chee Swee* [1984] 2 MLJ 60; [1984] 1 CLJ (Rep) 314). In the circumstances, we found no merit in the issue of limitation raised by learned counsel for the defendants.

[24] We similarly found no merit in the ground raised by the defendants that the plaintiffs claim had the element of a penalty and that it was unenforceable. The case of *Realvest* that was relied upon by the defendants was distinguishable. In *Realvest*, the interest was not agreed upon between the parties, the rate was exorbitant and it was calculated retrospectively. In the instant case, the rate of interest was agreed upon, hence the defendants could not be heard to complain that it was exorbitant and the interest was calculated from the date of default. It follows therefore that the counterclaim by the defendants for the refund of the late payment interest could not be sustained (see *Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513; [2000] 1 CLJ 346; *Kok Swee Chin v General Factoring & Credit Sdn Bhd* [2004] 6 MLJ 276; [2004] 6 CLJ 101).

[25] In any event, the part payment for the interest had been made by the first defendant, albeit the delay, pursuant to the agreements. In our view, there could not be a mistake as such when payment was made by the first defendant with the clear knowledge and intention to settle part of the outstanding interest due to the plaintiff under the agreements (see *Malayan Banking Bhd v Ching Suit Fee* [2012] 2 MLJ 289; [2012] 3 CLJ 606).

[26] Insofar as the guarantors were concerned, as clearly set out in the guarantee, the liability to pay arose upon a written demand. Time therefore started to run from the date of the demand and not from the date of the breach by the borrower (see *Bank Bumiputra Malaysia Bhd v Fu Lee Development Sdn Bhd & Ors* [1991] 2 MLJ 202). And taking the date of the notice of demand, there was no doubt that the plaintiff was well within time to file the suit against the guarantors.

[27] The principal debtor clause did not obviate the need for a notice of demand to the guarantors (see *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155; *MBF Finance Bhd v Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180; *Re Taylor, Ex parte Century 21 Real Estate Corporation* (1995) 130 ALR 723). The clause,

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in our view, merely reiterated the obligation or the liability on the part of the guarantors to make good the guarantee and to repay the instalments or the amounts due to the borrower, as would the principal debtors.

[28] Based on the foregoing, we were unanimous in our views that the learned judge was correct in her decision. We dismissed the appeal and affirmed the decision of the High Court. We ordered costs of RM8,000 to be paid by the appellant to the respondent and the deposit be refunded to the appellant.

Appeal dismissed with costs.

Reported by Kanesh Sundrum